

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
RIVER CITY RECREATION CENTER, )  
 )  
Appellant, )  
 )  
v. )  
 )  
SOUTHWEST AIR POLLUTION )  
CONTROL AUTHORITY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

PCHB No. 85-6

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the appeal of a Notice of Violation and Civil Penalty of \$1,000 for allegedly open burning of prohibited material in violation of Section 400-035 of Regulation I, came on for formal hearing before the Pollution Control Hearings Board; Lawrence J. Faulk (presiding), on April 4, 1985, at Vancouver, Washington. The formal hearing was electronically recorded. Wick Dufford, Lawyer Member, and Gayle Rothrock, Vice Chairman, have reviewed the record and listened to the electronic recording of the hearing.

Appellant was represented by Dennis Elam, the president of the

1 firm. Respondent Southwest Air Pollution Control Authority (SWAPCA  
2 appeared by its attorney David Jahn.

3 Witnesses were sworn and testified. Exhibits were examined. From  
4 the testimony heard and exhibits examined, the Board makes these

5 FINDINGS OF FACT

6 I

7 Respondent Southwest Air Pollution Control Authority (SWAPCA) is a  
8 municipal corporation with responsibility for conducting a program of  
9 air pollution prevention and control pursuant to the Washington Clean  
10 Air Act, chapter 70.94 RCW, in a multi-county area which includes the  
11 town of Washougal in Clark County. SWAPCA has, pursuant to RCW  
12 43.21B.270, filed with this Board a certified copy of its revised  
13 general regulation, as adopted and amended through April 17, 1984, the  
14 contents of which are noticed.

15 II

16 Appellant River City Recreation Center is a boating sales and  
17 marine equipment company located at 115 First Street in Washougal,  
18 Washington. The company opened at this location on December 1, 1984,  
19 its operator having moved his business to this state from Oregon.

20 III

21 On December 18, 1984, in the afternoon, appellant conducted an  
22 outdoor fire on its premises. The fire was small--approximately six  
23 feet wide by two feet high. It consisted primarily of cardboard boxes  
24 unpacked from the company's move. A small amount of styrofoam packing  
25 material was also included.

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1 Appellant's president, Mr. Elam, testified that conditions were  
2 cool and rainy and that the fire made little smoke. SWAPCA's  
3 inspector testified that it produced black smoke and had the "odor of  
4 prohibited material." The smoke did not appear dense from a black and  
5 white photograph of the event, admitted into evidence.

6 IV

7 SWAPCA's inspector noticed the fire while on routine patrol,  
8 arriving at the scene at 2:05 p.m. He left a field notice of  
9 violation with Mr. Elam which alleged unlawful open burning "in  
10 violation of SWAPCA General Regs for Air Pollution Sources 400-035."  
11 The fire was promptly extinguished, having burned for perhaps an hour.

12 V

13 Appellant neither applied for nor received a permit for the  
14 burning in question. SWAPCA's inspector testified that if appellant  
15 had applied, no permit would have been issued. He asserted that the  
16 fire included prohibited materials and that no permit can be obtained  
17 to burn such materials. Moreover, he stated that a burning permit  
18 could not be issued to a commercial establishment.

19 VI

20 At the hearing, SWAPCA's executive director explained the  
21 regulatory system for open burning as understood by the Agency.  
22 Except during the burning season, no fire can be burned without a  
23 permit. (The declaration of a burning season twice a year functions  
24 as a kind of general permit, but is apparently limited to residential  
25 burning.) The agency reads the statute as prohibiting all open

1 burning except the burning of natural vegetation. Commercial entities  
2 can burn natural vegetation only in connection with land clearing  
3 projects and, then, only outside of cities where the population  
4 density is less than one thousand per square mile.

5 SWAPCA's executive director reiterated that appellant could not  
6 get a permit to burn cardboard.

7 VII

8 On December 19, 1984, appellant was issued a regular notice of  
9 violation and notified of the assessment of a civil penalty of \$1,000  
10 for the fire burned in December. He received the notice on  
11 December 22, 1984. From this appellant appealed to this Board on  
12 January 7, 1985. The violation alleged was:

13 Permitting and maintaining an open fire containing  
14 material other than natural vegetation in violation  
15 of Section 400-035 of the [SWAPCA regulations] and  
chapter 70.94.040 and 775 of the Revised Code of  
Washington.

16 VIII

17 SWAPCA's executive director testified that the amount of penalty  
18 stemmed from the asserted violation of the provisions of RCW  
19 70.94.775. He said that he had been instructed by his Board of  
20 Directors to assess the maximum penalty whenever provisions of the  
21 statute (as opposed to the authority's regulations) had been violated.

22 IX

23 Appellant's president professed a lack of knowledge of applicable  
24 burning restrictions, but a desire to comply with the law. He asked  
25 for leniency in light of his recent arrival in the state. The company

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1 has no record of prior violations.

2 X

3 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
4 adopted as such.

5 From these Findings of Fact the Board comes to these

6 CONCLUSIONS OF LAW

7 I

8 The Board has jurisdiction over the issues and parties. Chapter  
9 43.21b and 70.94 RCW.

10 II

11 The violations asserted are of Section 400-035 of SWAPCA's  
12 Regulation, of RCW 70.94.040 and of RCW 70.94.775.

13 Section 400-035 provides, in pertinent part:

14 No person shall ignite, cause to be ignited, permit to  
15 be ignited, or suffer, allow, or maintain any open  
16 fire within the jurisdiction of the Authority, except  
as provided in this Regulation.

17 (1) Fires set only for recreational purposes or  
18 cooking of food for human consumption are excepted  
from provisions of this regulation provided no  
nuisance is created.

19 (2) Open Burning may be done under permit:

20 (a) Burning permits may be provided by the local  
21 fire department, fire district or Washington  
State Department of Natural Resources.

22 (b) No permit shall be issued unless the Control  
23 Officer is satisfied that:

24 (1) No practical alternate method is available  
25 for the disposal of the material to be  
26 burned. (The Authority has a written Open  
Outdoor Fire Policy describing times,  
areas and kinds of permitted open fires).

- (11) No salvage operation by open burning will be conducted.  
(iii) No garbage will be burned.  
(iv) No animals will be disposed of by burning.  
(v) No material containing asphalt, petroleum products, paints, rubber products, plastic or any substance which normally emits dense smoke or obnoxious odors will be burned.

RCW 70.94.040 provides:

Except where specified in a variance permit, as provided in RCW 70.94.181, it shall be unlawful for any person to cause air pollution or permit it to be caused in violation of this chapter, or of any ordinance, resolution, rule or regulation validly promulgated hereunder.

RCW 70.94.775 states:

No person shall cause or allow any outdoor fire:

(1) containing garbage, dead animals, asphalt, petroleum products, paints, rubber products, plastics, or any substance other than natural vegetation which normally emits dense smoke or obnoxious odors except as provided in RCW 70.94.650: Provided, That agricultural heating devices which otherwise meet the requirements of this chapter shall not be considered outdoor fires under this section;

(2) During a forecast, alert, warning or emergency condition as defined in RCW 70.94.715;

(3) In any area which has been designated by the department of ecology or board of an activated authority as an area exceeding or threatening to exceed state or federal ambient air quality standards, or after July 1, 1976, state ambient air quality goals for particulates, except instructional fires permitted by RCW 70.94.650(2).

### III

SWAPCA cannot properly assert a violation of its regulations for failure to obtain a permit in circumstances where no permit could be obtained. The reason no permit could be obtained is because, in SWAPCA's view, the kind of burning conducted is not allowed.

1 Therefore, the legal problem here is not the lack of a permit. It is  
2 whether, under substantive standards, the fire appellant burned is  
3 unlawful.

4 IV

5 Section 400-035 of the regulation does not explicitly prohibit the  
6 burning of cardboard. Thus, the only way it could be considered a  
7 prohibited material is if it is a "substance which normally emits  
8 dense smoke or obnoxious odors."

9 There is no evidence in this record that burning cardboard  
10 "normally" has this effect, or indeed, that such burning had this  
11 effect in the present case.

12 Whatever SWAPCA's inspector may have meant by the "odor of  
13 prohibited materials" falls short of the proof needed to show that the  
14 cardboard in this fire fits into the prohibited category under the  
15 regulation.

16 V

17 There is no proof that the fire in question violated RCW 70.94.040  
18 by causing "air pollution." That term is statutorily defined and  
19 encompasses concentrations of contaminants which have an injurious  
20 effect or create a harmful potential. RCW 70.94.030(2); Kaiser  
21 Aluminum v. Pollution Control Hearings Board, 33 Wn App. 352, 654 P.2d  
22 723 (1982).

23 VI

24 As to the express statutory prohibitions, cardboard is not among  
25 those substances specifically listed in RCW 70.94.775(1). The

1 culminating generic prohibition relating to "any substance other tha  
2 natural vegetation which normally emits dense smoke or obnoxious  
3 odors," must, by traditional methods of interpretation, be limited to  
4 substances which produce effects like those produced by burning the  
5 listed items; e.g., garbage, dead animals, asphalt. Cardboard was not  
6 shown to have such effects.

## 7 VII

8 Further, the conclusion that RCW 70.94.775(1) prohibits all  
9 outodoor burning except the burning of natural vegetation is a  
10 misinterpretation of the statute. If such an encompassing prohibition  
11 were intended, the listing of materials specifically prohibited in  
12 fires would have been unnecessary.

13 Similarly, the statute does not itself ban commercial open burning  
14 within densely populated areas. See RCW 70.94.750(2).

15 What the Clean Air Act does is provide legislative guidelines to  
16 be implemented by detailed regulations. RCW 70.94.755. Whether such  
17 regulations could properly ban all open burning except the burning of  
18 natural vegetation or all commercial open burning inside cities, we do  
19 not address. What is indisputably clear is that SWAPCA in its  
20 regulations has banned neither of these things.

21 To the extent that neither the statute nor the implementing  
22 regulations impose the limitations the Agency purports to be  
23 enforcing, the limitations themselves are unenforceable.

## 24 VIII

25 Accordingly, had the fire in question contained solely cardboard,

1 we would be obliged to conclude that no violation of the Act or of the  
2 regulations occurred. However, styrofoam was present in the fire.  
3 Under the evidence the amount of styrofoam was de minimis, and there  
4 was no testimony relating to its chemical composition. Yet, the Board  
5 takes notice that styrofoam contains plastic materials and concludes,  
6 therefore, that a technical violation of Section 400-035 for burning  
7 prohibited materials shown.

8 IX

9 RCW 70.94.431(1) allows the imposition of a civil penalty for  
10 violation of regulations implementing the Clean Air Act. The penalty  
11 shall be "in the form of a fine in an amount not to exceed one  
12 thousand dollars per day for each violation." The term "not to exceed"  
13 necessarily implies the use of judgment in determining how much the  
14 penalty should be in any instance.

15 The statute sets no explicit standards, but implicit in the  
16 penalizing function is an individualized consideration focusing on the  
17 seriousness of the violation and the behavior of the violator. The  
18 review procedures available provide a procedural safeguard against  
19 arbitrary action in penalty setting, Glascom Builders v. Yakima County  
20 Clean Air Authority, 85 Wn.2d 255, 534 P.2d 33 (1975), but the initial  
21 assignment of penalty by the Agency should reflect a consideration of  
22 the circumstances and an attempt to select the level of sanction  
23 appropriate to change behavior and secure compliance.

24 SWAPCA has totally abdicated this function in every instance  
25 where, by its own interpretation, the statute itself has been

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1 | violated. Simply to assess the statutory maximum in all such cases  
2 | to evade a critical statutory responsibility. To disregard questions  
3 | of justice in the individual case endangers the integrity of the whole  
4 | effort to achieve clean air.

5 | The instant proceeding is an example of how such a policy can lead  
6 | to unreasonable results. The activities in question simply do not  
7 | support a \$1,000 fine. In the circumstances the figure is in fact  
8 | shocking. A citizen should not be forced to the extremity of filing  
9 | an appeal to get any consideration at all of how much of a penalty is  
10 | fair in his case.

11 | X

12 | The Board, therefore, concludes that although a technical  
13 | violation was made out, only a nominal fine should be imposed.  
14 | Moreover, the nominal fine sustained should be suspended to be  
15 | expunged from the record if there are no further violations for a year.

16 | X1

17 | Any Finding of Fact which is hereby deemed a Conclusion of Law is  
18 | hereby adopted as such.

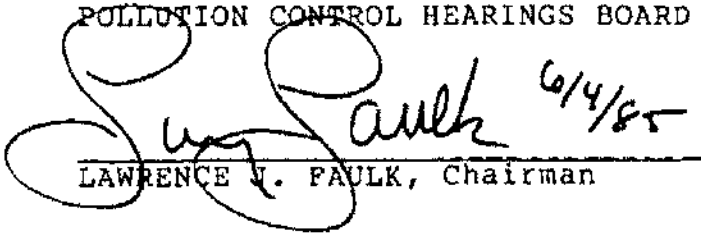
19 | From these Conclusions of Law the Board enters this  
20 |  
21 |  
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23 |  
24 |  
25 |


ORDER

The Notice of Violation is affirmed but the penalty is vacated except as to \$25. A penalty of \$25 is affirmed, but is suspended for a year on condition the appellant commit no further violations of SWAPCA's rules during that time. If the condition is fulfilled, the penalty shall be expunged from SWAPCA's records.

DONE this 5<sup>th</sup> day of June, 1985.

POLLUTION CONTROL HEARINGS BOARD

 6/4/85  
LAWRENCE V. FAULK, Chairman

  
WICK DUFFORD, Lawyer Member

  
GAYLE BOTHROCK, Vice Chairman